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No. 89-1054

In The

Supreme Court of the United States

October Term, 1989

BITUMINOUS CASUALTY CORPORATION,

Petitioner,

vs.

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF THE LATTER-DAY SAINTS AND TYRUS R. ATKINSON, JR.

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Rule 11 sanctions are appropriately addressed against a party when that party refuses to dismiss its action after discovery reveals that the Complaint is not well grounded in fact and law.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF FACTS

After a fire ignited by a roofing contractor caused substantial damage to one of Respondent's church buildings; Respondent attempted to invoke the insurance coverage of the roofing contractor shown on a certain certificate of insurance produced under contract provisions of Respondent's contract with the roofing contractor which required the contractor to have liability insurance and to produce a certificate of insurance to that effect. (R-1-1-1). When no response was received from the Petitioner who was shown as insurer of the roofing contractor on the certificate of insurance, Respondent

retained an experienced arson and fire investigator to conduct an investigation. The investigator did a full and complete investigation of the facts of the case and interviewed every witness who was thought to have any information. (R7-158-Exhibit A). The consultant and owner's representative retained by the Respondent to negotiate the contract with the roofing contractor on behalf of the Respondent, told Respondent that all insurance requirements including the certificate of insurance had been complied with by the roofing contractor in a conference held before the contract was signed and well before the fire. (Affidavit: L.J. Findlay). The consultant told the arson and fire investigator that he had received a certificate of insurance before the fire showing the roofing contractor to be insured by Petitioner. (R7-158-Exhibit A). After the case was referred by Respondent to counsel for litigation, the consultant was reinterviewed by the investigator and by counsel. (R7-158-Exhibit B). Complaint was filed alleging that the certificate of insurance was received by the consultant before the fire. (R1-1-1). A month after the Complaint was filed counsel for Petitioner directly contacted the consultant and obtained from him an affidavit stating he had never had a certificate of insurance at all and never even requested one. (R1-7-Affidavit: Roger E. DeLisle). Counsel for Respondent, when they became aware of this affidavit, reinterviewed the consultant, who repudiated the affidavit and made a new affidavit stating that he had received a certificate before the fire. (R5-107-Exhibit A). The consultant later changed his testimony again stating that he had actually received three certificates of insurance after the fire. (Deposition: Roger E. DeLisle). After the final change

of testimony by the consultant, Respondent amended the complaint, replacing the allegation that a certificate had come in before the fire with an allegation that the certificate had come in after the fire. (R1-48-1). Petitioner was dismissed with prejudice and the case proceeded to trial against the remaining defendants. (R4-90-1) (R8-188-1).

REASONS FOR NOT GRANTING THE WRIT

I. THE QUESTION PRESENTED FOR REVIEW BY PETITIONER IS NOT IN ACCORD WITH THE FACTS OF THIS CASE.

Petitioner makes it appear that Respondent refused to dismiss its action after discovery revealed that the Complaint was not well founded in fact and law.

The only item in issue was one single factual allegation in a lengthy Complaint. The single factual allegation did not undermine the entire case. *Compare Oliveri v. Thompson*, 803 F. 2d 1265, cert. den. 480 U.S. 918 (2nd Cir. 1986). The consultant witness changed his testimony after the Complaint was filed on this issue on at least three occasions leaving not only Respondent, but all parties, unsure of what the ultimate trial testimony of this witness would be.

Before discovery was completed, Respondent amended its Complaint to take out the disputed allegation and dismissed Petitioner, with prejudice. (R4-90-1). Petitioner objected to being dismissed with prejudice and insisted upon remaining in the case.

Respondent did not dismiss Petitioner because its Complaint was not well founded in fact and law. It was. Petitioner was dismissed because the cost of proceeding against Petitioner's numerous filings was making the case unduly expensive to pursue. (R4-90-1).

II. THE ALLEGED CONFLICT IN THE CIRCUITS IS ILLUSORY, SINCE THE CASES CAN BE RECONCILED.

Petitioner contends that the basic issue in this case is whether Rule 11 imposes a continuing duty upon an attorney to discontinue the litigation when discovery reveals that the claim is groundless in fact and law.

That was not the basic issue in this case. The issue was whether the Complaint was well grounded in fact and law after a reasonable pre-filing inquiry under Rule 11, *F.R.Civ.P.* Petitioner apparently now concedes that the Complaint was well grounded in fact and in law, as found by the Eleventh Circuit Court of Appeals, since that issue is not contested in the Petition.

Petitioner's question presented, though not the controlling issue in this case, is unsupported by the authorities cited in support of the alleged conflict between the circuits.

Petitioner first contends that the Eleventh Circuit rejected a prior contrary holding in *Collins v. Walden*, 834 F.2d 961 (11th Cir. 1987). In *Collins* counsel filed a complaint and after discovery dismissed the complaint. A second complaint was filed on the same facts and grounds as was the first complaint. The filing of the second complaint was found to be the Rule 11 violation.

When the trial court held that the litigant and counsel should discontinue their quest, the court was referring to a discontinuance of the suit after the first filing and discovery revealed no merit to their claim. The filing of the second complaint knowing what had been discovered during the proceedings on the first complaint was the violation. Petitioner's contention that *Collins* is a contrary holding to this case is both inaccurate and misleading.

Petitioner misstates the holding in *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866 (5th Cir. 1988) in an attempt to show a conflict within the Circuits. Petitioner states that *Thomas* held Rule 11 "does not apply to subsequent actions or filings by an attorney after the litigation has commenced." (Petition: p.8). *Thomas* held that "Rule 11 applies to each and every paper signed during the course of the proceedings and requires that each filing reflect a reasonable inquiry." *Thomas v. Capital Security Services, Inc.*, supra at p. 875. None of the cases cited by Petitioner supports the conflict Petitioner attempts to show by misstating *Thomas*. The cases are fully in accord with what *Thomas* actually held regarding subsequent pleadings.

Petitioner next contends that the Second Circuit is in conflict with the Eleventh Circuit citing *City of Yonkers v. Otis Elevator Company*, 844 F. 2d 42 (2nd Cir. 1988); *Oliveri v. Thompson*, 803 F.2d 1265, cert. den. 480 U.S. 918 (2nd Cir. 1986); and *Lane v. Sotheby Parke Bernet, Inc.*, 758 F.2d 71 (2nd Cir. 1985).

A close reading of the *Yonkers* case shows that the filing of the complaint constituted the *Rule 11* violation.

Counsel for *Yonkers* had in hand all of the contract documents which should have shown him that the claims asserted in the Complaint were not well founded in fact or law. The trial court found sanctions "for filing fraud claims that 'lacked any colorable factual basis' ." *City of Yonkers v. Otis Elevator Company,* supra at p. 44. This language clearly refers to the Complaint. The trial court elected, in its discretion, to limit sanctions. *Yonkers* is a case where a complaint was filed lacking any colorable factual basis. This case does not conflict with *Oliveri.*

Lane v. Sotheby Parke Bernet, Inc., 758 F.2d 71 (2nd Cir. 1985), is a per curiam opinion with insufficient facts to determine if the plaintiff filed additional pleadings in continuation of his action so as to justify sanctions. The case was not remanded on Rule 11 grounds. It was remanded to determine if the prevailing party should recover attorneys' fees under 42 *U.S.C.* 1988 and 2000e-5K. It is not even a *Rule 11* case, Respondent contends, and represents no finding of a continuing duty under Rule 11, *F.R.Civ.P.* to dismiss a pleading. This case is not in conflict with *Oliveri v. Thompson* nor the Eleventh Circuit.

Petitioner contends that the Seventh Circuit is in conflict with the Eleventh Circuit. Petitioner cites in support the cases of the *Flip Side Productions, Inc. v. Jam Productions, Ltd.,* 843 F.2d 1024 (7th Cir. 1988) and *Pantry Queen Foods, Inc. v. Lifschultz Fast Freight, Inc.,* 809 F.2d 451 (7th Cir. 1987).

The *Pantry Queen* case was one where the complaint was found to be "specious" and not well founded in fact or law. *Id.* at p. 452. A negligent failure to inquire into the

facts occurred. It is fully in accord with *Oliveri v. Thompson*, 803 F.2d 1265, cert. den. 480 U.S. 918 (2nd Cir. 1986), which is cited therein and in accord with the Eleventh Circuit in this case.

Flip Side Productions, Inc. v. Jam Productions, Ltd., 843 F.2d 1024 (7th Cir. 1988), while containing language which might appear to support Petitioner's argument, does not actually do so upon careful examination. It is clear from reading the opinion, that Flip Side's complaint against Tempo was not well grounded in fact or law. Tempo only thought itself entitled to its fees in preparing material after discovery was closed. This is what Tempo requested and that was the issue before the court. The court found Tempo entitled to those limited sanctions. Had Tempo requested sanctions from the time the amended complaint was filed, it may well have prevailed. This case does not stand for the proposition that a complaint proper under *Rule 11* can become a sanctionable violation, after discovery, where no further filings are made, which is the position Petitioner takes. *Flip Side* is not in conflict with the Eleventh Circuit in result.

Petitioner contends that the First Circuit conflicts with the Eleventh Circuit, citing *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600 (1st Cir. 1988). *Muthig* is clearly a case where the complaint was not well grounded in fact as to the defendant requesting *Rule 11* sanctions. Both the clients and their attorney should have known this when the complaint was filed. The case says nothing about a continuing duty nor does it support Petitioner's theory in any way. The case is certainly not in conflict with the Eleventh Circuit.

Petitioner contends that the Sixth Circuit is in conflict with the Eleventh Circuit, citing *Herron v. Juniper Transportation Company*, 858 F.2d 332 (6th Cir. 1988). This case does refer to a continuing duty. This refers to review of a complaint filed in state court when removed by an opponent to federal court. The court held that a minimal inquiry into the facts subsequent to removal would have disclosed that the complaint was without factual or legal support. What the court held in *Herron* was that when a complaint which would have been a *Rule 11* violation if filed in federal court, is filed in state court, then removed to federal court, such complaint then becomes a pleading subject to *Rule 11*. The continuing duty here referred to is not the continuing duty contended by Petitioner. The Complaint in this case was a *Rule 11* violation at the time it was filed in federal court. Sanctions were proper under *Rule 11*. In result this case is not in conflict with the Eleventh Circuit.

The *Herron* court discusses the continuing obligation that it finds in *City of Yonkers v. Otis Elevator Company*, supra, and *Flip Side Productions, Inc. v. Jam Productions, Ltd.*, supra. Respondent contends that neither truly illustrate this continuing obligation. *Yonkers* and *Flip Side* reveal not a continuing obligation but simply a reluctance to impose Rule 11 sanctions upon parties who had filed complaints in violation of Rule 11 for attorney fees incurred before the completion of discovery, Respondent contends. *Yonkers* and *Flip Side* are not cases where a more stringent application of Rule 11 was applied, as Petitioner seems to be contending, but are cases where a more lenient standard was applied.

Petitioner cites *Michaels Building Company v. Ameritrust, Co.*, 848 F.2d 674 (6th Cir. 1988) in its Table of Authorities but does not discuss the case in the Petition. It is not even a Rule 11 case and does not hold any continuing duty to dismiss under Rule 11, *F.R.Civ.P.*

Petitioner cites *Equal Employment Opportunity Commission v. Milavetz and Associates, P.A.*, 863 F.2d 613 (8th Cir. 1988), as authority for a conflict in Circuits. This case differs from the others cited in that the award of sanctions falls under the other prongs of *Rule 11* relating to improper purpose, harrassment and unnecessary delay and the similar provisions of 28 *U.S.C.* 1927. The court found the conduct of counsel constituted a pattern of uncooperativeness and delay begun before litigation even commenced and continuing through the litigation. This case has nothing to do with factual inaccuracies. Respondent agrees that counsel have a continuing duty not to act for an improper purpose. Those prongs of *Rule 11* are not in this case. Respondent does not see this case to be in conflict with the Eleventh Circuit.

Gaiardo v. Ethyl Corporation, 835 F.2d 479 (3rd Cir. 1987), is not in conflict with the Eleventh Circuit.

The Eleventh Circuit opinion in this case is not in conflict with any rulings of this Court and, Respondent contends, complies with the plain meaning standard set out in *Pavelic & LeFlore v. Marvel Entertainment Group*, ___ U.S. ___, 110 S. Ct. 456 (1989).

In summary, none of the cases cited by Petitioner hold that a complaint which is not a *Rule 11* violation when filed can become a *Rule 11* violation by what is learned in discovery. This is the position Petitioner must

sustain since it does not challenge in its Petition the correctness of the Eleventh Circuit finding that no *Rule 11* violation occurred upon the filing of the complaint. *See Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Associated Contractors, Inc.*, 877 F.2d 938 reh. den. en banc 888 F.2d 1389 (11th Cir. 1989).

Each of the cases cited by Petitioner are cases where the *Rule 11* violation occurred upon the filing of the complaint or answer. The various courts chose to impose sanctions differently, within their discretion, according to the individual facts of each case.

Respondent concedes that each and every document filed in a case must comply with the requirements of *Rule 11*. There is a continuing duty not to violate *Rule 11* by any such filing. Petitioner concedes that there were no such filings in this case.

Petitioner flatly states that the First, Second, Sixth, Seventh, and Eighth Circuits clearly hold that *Rule 11* does in fact impose a continuing obligation on an attorney such that Rule 11 would require an attorney to dismiss a claim that discovery reveals is groundless or suffer sanctions. (Petition: p.18). Respondent can find no such authority in the cases cited by Petitioner.

The only case cited which discusses a continuing obligation of the type contended by Petitioner is *Robinson v. National Cash Register Co.*, 808 F.2d 1119 (5th Cir. 1987). As Petitioner points out, the Fifth Circuit rejected the *Robinson* continuing obligation approach in the en banc decision in *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866 (5th Cir. 1988).

Though continuing duty is mentioned in several of the cases cited by Petitioner, the cases themselves explain what is meant within the context of the facts of that particular case. Those references do not illustrate the holdings Petitioner contends exists in those cases, it is contended.

Respondent argues that all of the cases cited by Petitioner are compatible. Though continuing duty is mentioned in some of the cases, no continuing duty of the kind contended by Petitioner, has been imposed upon any party in any of these cases under Rule 11, *F.R.Civ.P.*

III. THE RIGHT AND FAIR RESULT WAS REACHED BY THE ELEVENTH CIRCUIT COURT OF APPEALS AND EVEN IF PETITIONER WERE TO PREVAIL ON THIS WRIT THE RESULT WOULD NOT LIKELY CHANGE, BUT THERE WILL BE A SUBSTANTIAL EXPENDITURE OF RESOURCES BY THE COURTS AND COUNSEL TO NO VALID PURPOSE.

Sanctions in the trial court were not limited to some period where Respondent had a continuing duty to dismiss its suit against Petitioner. Sanctions were imposed from the date the complaint was filed to the date Petitioner was dismissed. The trial court found that no prefiling inquiry had been done and that the complaint constituted a *Rule 11* violation. This finding was an abuse of discretion and was reversed in a well reasoned opinion of the Eleventh Circuit Court of Appeals. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Associated Contractors, Inc.*, 877 F.2d 938 reh. den. en banc 888 F.2d 1389 (11th Cir. 1989).

Even if there was found to be a continuing duty under *Rule 11* to dismiss when discovery demands, it would not likely change the result in this case. Respondent did amend before the end of discovery and did dismiss Petitioner from the case, with prejudice.

It is likely that if the courts involved were required to determine when the continuing duty began and ended, the result would be the same. It would simply be an unproductive use of judicial resources to no valid purpose.

Rule 11, F.R.Civ.P. places a responsibility upon a party and counsel to certify, by signing, that the document is well grounded in fact and is warranted by existing law, or a good faith argument for the extension, modification, or reversal of existing law, and is not interposed for an improper purpose.

This language appears to apply to the time of signing and filing the document. Respondent contends that the holdings of the various courts cited in the Petition and Response interpret the Rule in this way. A *Rule 11* violation cannot, it is contended, arise solely from a continuing duty to dismiss. Any continuing duty in this respect concerns mitigation of damages from an earlier, true *Rule 11* violation.

IV. CONCLUSION

Respondent respectfully prays that the Petition for Writ of Certiorari be denied. Any conflict within the Circuits regarding whether there is a duty to dismiss after

discovery under *Rule 11*, which Respondent denies exists, has not developed to a point where it is ripe for review. The Circuits are proceeding to a consensus on matters relating to the imposition of *Rule 11* sanctions. It is too soon to know if any conflict will occur. The Eleventh Circuit Court of Appeals did not render the decision in this case in conflict with any other court of appeals nor did it depart from the accepted and usual course of judicial proceedings. There is no special or important reason to grant this Writ. Petitioner fails to show compliance with *Rule 17, Rules of the Supreme Court of the United States*, and for that reason and the other reasons raised in this Response, the Petition for Writ of Certiorari should be denied.

Petitioner respectfully prays that the matter of Petitioner misstating the holding in *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866 (5th Cir. 1988) which was followed by the Eleventh Circuit in this case, with the effect of purporting to show a conflict between the Circuits, and thus attempting to invoke the Court's jurisdiction under Rule 17(a), *Rules of the Supreme Court of the United States*, be considered under the provisions of Rule 49(2) and 50, *Rules of the Supreme Court of the United States*.

Respectfully submitted,

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